

# PUBLIC LAW FROM THE BOTTOM UP

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This article is adapted from the West Virginia University College of Law, Edward G. Donley Memorial Lectures I delivered in March 1994. I am grateful to the Faculty of the College of Law for extending me this invitation and to Dean Terece Foster for hosting my stay and giving me excellent comments on the Lectures. This article has greatly benefited from her comments and the questions posed by faculty and students at the Lectures. As a native West Virginian, I am honored by the chance to have developed the ideas in this article at my home state. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term - Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 27 (1994), explores related themes in connection with this year's Supreme Court cases.

## I. INTRODUCTION: LAW FROM THE BOTTOM UP

American public law has traditionally been understood as an insider's game. Within this understanding, law is following the rules laid down, particularly those laid down by the United States Supreme Court. Rigorous legal analysis treats Supreme Court opinions as self-contained exercises to be understood or criticized from the inside — from the point of view of the Supreme Court Justices who write them. Thus, a turn-of-the-century formalist would try to situate a decision in the larger geometric unity of law, or might fault a decision for being inconsistent with precedent. Although the realists of the 1920s rejected this sort of analysis and more aggressively criticized the Court, they too read the cases through the eyes of the Court — albeit a Court following a political or personal agenda. The legal process school of the 1950s was realist in understanding law as policy and formalist in evaluating the Court through criteria such as reasoned elaboration, deference, and coherence with neutral or authoritative principles. But like the formalists and the realists before them, legal process thinkers were insiders, viewing law from the perspective of the New Deal Presidency and Court.

These three generations of differently disposed legal thinkers — the formalists, the realists, the legal process thinkers — shared a similar vision: law is something handed down to the populace by high officials following professional norms, and the citizenry is obligated to follow the rules simply because they are the rules handed down by the duly established mechanisms for handing down rules.<sup>1</sup> Let me be explicit about the assumptions of traditional law:

- It is handed down by officials at the “top” to citizens below. We can call this the *top-down* assumption.<sup>2</sup>

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1. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4-5 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958); H. L. A. HART, *THE CONCEPT OF LAW* (1961).

2. As used in this article, the top-down, bottom-up terminology was first used in JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992). The terminology is used in similar ways in Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 C.R.-C.L. L. REV. 323 (1987); Richard A. Posner, *Legal Reasoning from the*

- Law can be criticized only from the inside. Grounds for criticism must be objective and potentially universal: Is the decision consistent with other decisions? Does it rest upon erroneous factual premises? Did it ignore the views of experts charged with solving such problems? This is the *neutrality* assumption of public law.
- Our obligation to follow this law, its legitimacy, derives from criteria internal to law. Was the decision rendered by officials charged with making such decisions, and was it delivered according to the regular procedures for making such decisions? This is the *positivism* assumption.

This understanding of law makes less sense to the Baby Boom generation that came of age in the 1960s.<sup>3</sup> For most of us, “law” meant not just *Brown v. Board of Education*,<sup>4</sup> the 1954 Supreme Court decision that declared state-required school segregation inconsistent with the Equal Protection Clause of the Constitution, but also the private resistance to the *de jure* apartheid that *Brown* overthrew. The story of *Brown* illustrates the decline and fall of the top-down model of public law. Equally, it suggests the appeal of a model in which public law comes from the “bottom up,” representing a political struggle among different “nomic” communities.

The legal process generation, the most eminent legal thinkers of the 1950s, immediately praised *Brown* as a good decision and claimed it as one consistent with their strongly top-down vision of law. Justice Felix Frankfurter, a former law professor, blessed the decision with his acquiescence, and his acolytes (usually former law clerks) immediately spread the word that Frankfurter’s strategizing within the Court had

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*Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992).

3. Boomer critiques include ROBERT GORDON, LEGAL THOUGHT AND PRACTICE IN THE AGE OF AMERICAN ENTERPRISE, 1870-1920, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (G. Geison ed. 1983); Thomas Grey, *Langdell is Orthodoxy*, 45 U. PITT L. REV. 1 (1983); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985). See also William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1990).

4. 347 U.S. 483 (1954).

enabled the decision to be unanimous.<sup>5</sup> Henry Hart and Albert Sacks, who were then drafting their classic materials *on The Legal Process*,<sup>6</sup> lavishly praised *Brown* as reflecting a great and enduring “principle” of racial equality.<sup>7</sup> Alexander Bickel adapted his memorandum on the history of the Equal Protection Clause, which he had written when he was law clerk for Frankfurter, into a dense and detailed article concluding that *Brown* was defensible from an historical point of view.<sup>8</sup> Paul Freund, Archibald Cox, and other scholars too numerous to mention hopped on the *Brown* Bandwagon.<sup>9</sup>

Notwithstanding this enthusiasm, some legal process thinkers understood that *Brown* challenged their way of thinking. The most notable skeptic was Herbert Wechsler, a professor at Columbia whose 1959 essay praised *Brown* as a decision he liked, but who wondered whether it was actually “law.”<sup>10</sup> After all, Chief Justice Warren’s opinion implicitly overruled several Supreme Court precedents and made no effort to defend the overrulings as supported by a textual interpretation of the Constitution or by the original discussions surrounding the adoption of the Fourteenth Amendment. Given this default, the only defense of the decision, according to Wechsler, would be for the decision to rest upon some “neutral principle,” through an opinion “resting with respect to

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5. For a recent example of this from a former Frankfurter clerk particularly close to the Justice, see Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987). More balanced accounts include Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991); Dennis Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1954-1958*, 68 GEO. L.J. 1 (1979).

6. Hart & Sacks, *supra* note 1.

7. See Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96 (1954); Letter from Henry M. Hart, Jr., to Harry Wellington, Dec. 9, 1959, FRANKFURTER PAPERS, Harvard Law School Library, Box 187, Folder 20.

8. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

9. Paul Freund, *Storm over the American Supreme Court*, 21 MOD. L. REV. 345 (1958); Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

10. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Although Wechsler was virtually the only respectable law professor who was willing to question the “lawlikeness” of *Brown*, it is my judgment that his doubts were widely but silently shared among law professors.

every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”<sup>11</sup> Under this criterion, *Brown* is questionable, Wechsler observed, in some much quoted analysis:

[*Brown*] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed . . . . In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if “enforced separation stamps the colored race with a badge of inferiority” it is solely because its members choose “to put that construction upon it”? Does enforced separation of the sexes discriminate against females merely because it may be the females who resent it and it is imposed by judgments predominantly male? Does a prohibition of miscegenation discriminate against the colored member of the couple who would like to marry?

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved . . . .

But if freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant . . . .

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there any basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.<sup>12</sup>

Such an opinion was never written.<sup>13</sup>

Wechsler’s article initiated an academic discourse that has undermined the top-down view of law that Wechsler himself embraced. The discourse to which I refer is “narrative jurisprudence,” in which law’s universalist pretensions are undermined or complexified by particularized storytelling.<sup>14</sup> Remarkably, Wechsler’s article is an early exem-

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11. *Id.* at 15.

12. *Id.* at 33-34.

13. *Id.* at 33-34.

14. See generally Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989);

plar, perhaps the earliest to appear in the Harvard Law Review, of legal storytelling. The article contains little traditional legal analysis; most of the analysis is professionally introspective and historical. The most memorable parts of the article are personal, indeed confessional: Wechsler identifies himself as the friendliest possible critic of *Brown*, because he has a strong pro-civil rights background. He tells a story of how he worked with a black attorney, and they were unable to dine at Union Station because of its segregationist policy. Wechsler speaks of the embarrassment this caused him and his friend. He closes the article with the above-quoted, hand-wringing criticism of *Brown*, a criticism that was most powerful, because it came from someone who identified himself as unusually prepared to be persuaded by the decision or, indeed, to write the decision himself.

Wechsler's article was even more striking for what it assumed. Unlike the work of his colleagues in the academic legal establishment, Wechsler's personalized analysis made the assumptions of his generation clear to the reader. For one thing, the article made explicit the author's belief that *Plessy v. Ferguson*<sup>15</sup> had been "law" until it was overruled by *Brown*. This brought into sharper focus the traditional view of our profession that "law" is the stuff handed down by legislatures and courts; no matter how vile a statute is, it is "law" until unmade through the duly established mechanisms for change (the courts or the legislatures). More dramatically, Wechsler confessed uncertainty as to why *Plessy* should be overruled, insisting upon finding a neutral principle to do so. What he came up with was a right of association, which he immediately filtered through his own experience. He openly questioned whether segregationist law could be overturned *simply* because African Americans objected to it, or whether laws hurting women could be discarded *simply* because women resented it. Reasons per-

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Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Mary Irene Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992); Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992). For a critique, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

15. 163 U.S. 537 (1896).

suasive in Wechsler's world must be universal, not parochial; neutral, not partial.

Wechsler's combination of personalized narrative, self-reflective misgivings about a decision that many doubted but few were willing to criticize openly, and bizarre rhetorical questions inspired a steady stream of objections that continue to sound in law reviews today. One of the first to respond was Professor Charles Black of Yale, who had worked on one of the briefs in *Brown*.<sup>16</sup> A native of segregated Texas schools, Black refused to play Wechsler's neutral principles game and defended *Brown* at the level of personal narrative -- not just his narrative but the narrative of the people on whom segregation operated. His decidedly "unneutral" argument for *Brown* was essentially the following:

First, a certain group of people is "segregated." Secondly, at about the same time, the very same group of people, down to the last man and woman, is barred, or sought to be barred, from the common political life of the community — from all political power. Then we are solemnly told the segregation is not intended to harm the segregated race, or to stamp it with the mark of inferiority. How long must we keep a straight face?<sup>17</sup>

In 1960, most of the legal academy, surely including Wechsler, found these words indisputable, but they *could* keep a "straight face" because they had no vision of "law" that could fully comprehend or incorporate this sort of argument.

Black's words had great meaning for my generation, however. I attended public schools in West Virginia, with my seventh and eighth grades being segregated by race and the ninth through twelfth grades (recently) integrated. Clearly, racial segregation that still persisted was related to the residential segregation of African Americans in my town of Princeton, to the fact that none of the high-paying jobs in town were held by blacks, and to the social deference people of color paid to whites. From my point of view, as a white kid, the social, economic, and educational segregation was morally questionable. If you

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16. Charles Black, *The Lawfulness of the Segregation Decision*, 69 YALE L.J. 421 (1960).

17. *Id.* at 425.

had asked me who were the great figures in American law, I should have said Earl Warren and Dr. Martin Luther King, Jr., even though the latter was not a lawyer.

My grandfather, Horatio Erskine DeJarnette, was a West Virginia lawyer whom I greatly admired, but the main reason I went to law school was related to my admiration for Dr. King: I had a vague sense that service as a lawyer could be helpful to people, and liberatory to some. The most formative thing I read in law school was Richard Kluger's *Simple Justice*, which recounted the "History of Brown and Black America's Struggle for Equality," as the subtitle put it.<sup>18</sup> I was overwhelmed by its message that the hero of *Brown* was not Felix Frankfurter, who may have exaggerated his role, or even Earl Warren. One hero was Thurgood Marshall, who not only argued the case, but sweated blood throughout the South litigating *Plessy* in front of openly bigoted judges. There were many more heroes, including the Reverend Joseph DeLaine and Harry Briggs, who mobilized a wary black community to challenge segregation in Clarendon, South Carolina; Barbara Johns, a remarkable eleventh grader in Prince Edward County, Virginia, who organized a student strike by African-American students and called in the NAACP to challenge segregation in court; and, of course, Oliver Brown and his daughter Linda, who challenged the system in Topeka, Kansas.

Kluger's book suggested to me that "law" is not handed down from "the top," but often percolates up from "the bottom," from communities of citizens who experience the world or law in a certain way. Briggs, Johns, and Brown represented a community of interpretation that had a vision of law different from that in *Plessy*. Under their vision, separate cannot be equal if separate is inspired by put-downs at every level of social and political existence; the state is not being neutral if it builds upon an inhuman social arrangement; skin pigment is not a valid ground for the state or society to divide-off a segment of the population and label it inferior.

Before and during my law school career, the main legal academic voices responding to Wechsler were liberal white voices defending

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18. RICHARD KLUGER, *SIMPLE JUSTICE* (1976).



*Brown* as a great constitutional moment.<sup>19</sup> Since my departure from law school, the academic discourse on *Brown* has been more heterogeneous, and of course more critical. Some academics have argued that *Brown* and its implementation have had little if any impact upon American public education.<sup>20</sup> These scholars have picked up on Wechsler's theme that *Brown* was inspired by social policy, not law, and have suggested that the decision represents poor social policy. Other scholars have argued that *Brown* as implemented represented a tepid and substantially self-interested response by white America to deep problems of racial justice.<sup>21</sup> These scholars have read Wechsler as representative of a white America that literally cannot see the parochial nature of its own academic and legal standards. Critical race theory has developed this theme through the narratives, not of whites like Wechsler and Black, but of those Mari Matsuda calls "voices from the bottom."<sup>22</sup>

This sort of narrative jurisprudence (including feminist and gaylegal, as well as critical race theory) has explicitly questioned the traditional top-down understanding of public law. Among my generation, narrative jurisprudence enjoys a receptive audience for its three central ideas; the exposition that follows should be contrasted with the three assumptions of traditional law thought (top-down, neutrality, and positivism) discussed above.

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19. In addition to Black, see Cox, *supra* note 9; Louis Henkin, *The Supreme Court, 1967 Term — Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

20. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF DESEGREGATION* (1982).

21. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); ALLAN FREEMAN, *SCHOOL DESEGREGATION LAW: PROMISE, CONTRADICTION, RATIONALIZATION*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 86 (Derrick A. Bell, Jr., ed., 1980); Sidney Willhelm, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847 (1981).

22. See Matsuda, *supra* note 2.

A. *Law Comes from the "Bottom Up," Not from the "Top Down"*

Although high officials undoubtedly exercise a great deal of discretion as to what emerges as authoritative law, the engines for changing the law come from below. The effect of positive law is often known only when people speak up about it, and when a group of people begin to voice similar complaints hydraulic pressure builds for changing positive law. If those people feel intensely that their vision is the correct vision, the polity will pay dearly if it ignores them — like the Terminator, they will keep coming back until the system responds or they are completely suppressed. In short, the agents of legal change are the people themselves, not legal elites.

The distinction between a top-down and a bottom-up view of law is illustrated by an exchange seven years ago in the *Harvard Law Review*. The Review published an oral history by Philip Elman,<sup>23</sup> a Frankfurter clerk who had served as a link between the Justice and the Solicitor General's Office for several of the segregation cases. The history is a classic insider's account, crediting Frankfurter with creating the opportunity for *Brown*. Randall Kennedy, an African-American law professor at Harvard, responded that Elman's insider account slighted the more important role played by African Americans, especially Marshall and his (NAACP) Legal Defense and Education Fund, Inc. litigators and the parties to the cases.<sup>24</sup> From third-party accounts, Elman was shocked and deeply wounded by Kennedy's pointed criticism, but no less than Kennedy was shocked and wounded by Elman's treatment of blacks as "objects" of liberation by white elites, rather than as "subjects" of their own liberation. For Elman, as for Wechsler, law is handed down from the top. For Kennedy, as for me, law percolates up from the bottom. This is an important difference in the way that many scholars in the two generations view law.

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23. See Elman, *supra* note 5.

24. Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987).

*B. Positive Law is Not Neutral and Involves Struggle Among Competing Visions*

The late Bob Cover gave us a vocabulary for expressing this idea:<sup>25</sup> the NAACP and its allies were a “nomic” community, themselves “jurisgenerative,” creating new law that they hoped to persuade other groups to accept. Note here that not all African Americans accepted the NAACP’s integrationist vision, and the NAACP engaged in a struggle to persuade other blacks of their vision, with substantial success in the 1940s and 1950s.<sup>26</sup> Law is made by debates within and among different nomic communities. Viewed from the bottom, the role of high officials is not to create or declare law, but to suppress law, the law of the communities that the officials reject. High officials in this way are “jurispathic,” according to Cover. In *Brown* they chose the nomic vision of Thurgood Marshall, and they sought to suppress the vision of Jim Crow.

If positive official law is jurispathic, how does the official choose which law to accept? Ever since Wechsler’s article, legal scholars have been debating whether or not *Brown* can be defended on some neutral ground, as preferred by traditional legal theory. The evidence of the “original intent” of the framers of the Fourteenth Amendment is, as Chief Justice Warren recognized, not at all helpful.<sup>27</sup> Prominent scholars have tried their hands at neutral defenses, and none has been successful. The defenses of *Brown* that have most resonated with my generation have been those descended from Charles Black’s article;<sup>28</sup> like Black, these scholars have praised the decision for its moral prophesy.<sup>29</sup> They have developed an explicitly normativist defense of

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25. See Robert Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), reprinted in *NARRATIVE VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 95 (Martha Minow et al. eds., 1992).

26. See generally MANNING MARABLE, W. E. B. DUBOIS: BLACK RADICAL DEMOCRAT (1986); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

27. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977) (original intent strongly undermines *Brown*).

28. Black, *supra* note 16.

29. See, e.g., Ely, *supra* note 13; MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982); Bruce A. Ackerman, *Constitutional Law/Constitutional Politics*,

*Brown*, and the task of critical race theory in particular has been to develop a theory of racial justice that delivers on the promise of *Brown*.

### C. *Official Choice of Law Does Not Necessarily Settle Matters*

The most radical implication of viewing law from the bottom up is that what the top recognizes as "law" is not only the contingent choice of the top officials, but is also in need of normative justification. Was state-sanctioned apartheid "law" in the sense that people had a moral obligation to obey it? My recollection of the firehoses turned on black youths in Birmingham in 1963 and Selma in 1965 is the first memory I can pinpoint for the proposition that it can be honorable to disobey positive law if it is immoral. I invoked Dr. King's letter from a Birmingham jail in an extemporaneous speech praising him in 1969. When I read about campus protests against the War in Vietnam in 1969, I was unfazed by the college students' violation of private property rights. As someone who believed I would face the draft within four years, I had no sympathy for that unpopular war and felt that it was the war, and not the student protests, that was illegal.

The civil rights struggle preliminary to *Brown* taught my generation that what the Supreme Court said in *Plessy* was not necessarily law and might be resisted by communities of opposition. The aftermath of *Brown* taught my generation that even when a group wins at the Supreme Court level, the victory may be a hollow one unless consolidated and followed up by the victorious community and its allies.<sup>30</sup> In other words, officials may have homicidal intent, but do not necessarily kill the law they reject. The community supporting that vision of law might continue to resist, and often the choice of law itself may create a new community of resistance.

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99 YALE L.J. 453 (1989); Anthony E. Cook, *The Temptation and Fall of the Original Understanding*, 1990 DUKE L.J. 1163; Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

30. See S. Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

## II. DOCTRINAL ILLUSTRATIONS OF LAW FROM THE BOTTOM UP

Let me recapitulate the new assumptions about law suggested by *Brown* and developed above:

- Law comes from the bottom up. Official law is influenced, often decisively, by what goes on in communities subject to their commands. What officials say is law neither exhausts the subject nor ends debate.
- Choice of law is not neutral. It is deeply ideological, generational, and subject to shift in response to changed circumstances.
- Our obligation to obey the law is based upon its normativity and not just its official pedigree. Every time the polity tries to suppress a vision of law, it risks its legitimacy, because it risks alienating groups whose vision has been suppressed.

Consider this vision of law as a way to understand issues of statutory and constitutional interpretation.

### A. *Statutory Interpretation (Job Discrimination)*<sup>31</sup>

One of the consequences of the South's reaction to *Brown* and to Dr. King's peaceful protests was a public outcry for serious civil rights legislation, which was achieved in 1964. Title VII of the Civil Rights Act of 1964 prohibits employment practices that "discriminate" against racial minorities. This statute focused on intentional discrimination<sup>32</sup> and set up a cumbersome administrative apparatus designed to mini-

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31. This story is influenced by recent archival research set forth in HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY* (1991), reviewed in Neal Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723 (1991). See also HERMAN BELZ, *EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION* (1991).

32. See Civil Rights Act of 1964 §§ 703(a)(1), 706(g) (codified at 42 U.S.C. §§ 2000e-2(a)(1), -5(g) (1988)); 110 CONG. REC. 12724 (1964) (statement of Sen. Humphrey, D-Minn.).

mize the role of the Employment Opportunity Commission (EEOC) in the statute's development;<sup>33</sup> both trade-offs were made to attract the support of conservative Republicans in order to break the Southern filibuster in the Senate. Within eight years, a statute aimed at intentional racial discrimination was interpreted by the Burger Court to prohibit employer practices that had disparate racial effects.<sup>34</sup> The dynamic interpretation of Title VII began immediately after the statute went into force. It began at the declawed EEOC, as the activists who had worked to enact the statute — civil rights leaders and litigators, bureaucrats, and law professors — turned to the task of making the statute work to implement President Johnson's goal of "not just equality as a right and a theory but equality as a fact and equality as a result."<sup>35</sup>

From its first year in operation, key players at all levels of the EEOC believed that racial inequality in employment was the result of structural factors, not just the intentional discrimination identified by Congress, and that affirmative results were more important than formal requirements.<sup>36</sup> Based upon her labor law experience, EEOC staff member Sonia Pressman argued that it would be impractical to expect evidence of discriminatory intent in most cases. Just as litigants challenging racial discrimination in jury selection could rely on underrepresentation of minorities to prove bias, Pressman urged that plaintiffs ought to be able to make out a claim of employment discrimination based upon underrepresentation of minorities in the workplace.<sup>37</sup> The EEOC legal staff were candid about the tension between their views and the apparent compromises adopted in the 1964

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33. See Civil Rights Act of 1964 § 706 (a)-(f), (codified at 42 U.S.C. § 2000e-5(a)-(f) (1988)); GRAHAM, *supra* note 31, at 146-49.

34. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

35. President Johnson's Message at Howard University, 2 PUBLIC PAPERS OF PRESIDENT LYNDON B. JOHNSON 636 (JUNE 1965).

36. See WHITE HOUSE CONFERENCE ON EQUAL EDUCATIONAL OPPORTUNITY (1965). Several key agency players published explications and defenses of this ideology. See EEOC Executive Director Herman Edelsberg, *Title VII of the Civil Rights Act: The First Year*, 19 New York University Conference on Labor 289-95 (1967); ALFRED W. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* (1971).

37. Memorandum from EEOC staff attorney Sonia Pressman to EEOC General Counsel Charles T. Duncan, 31 May 1966, described and quoted in GRAHAM, *supra* note 31, at 244-47.

statute, but urged that their approach was the most practical way to enforce the statute. By the end of the Johnson Administration, the EEOC Commissioners publicly interpreted the statute to bar employer practices "which prove to have a demonstrable racial effect."<sup>38</sup> The EEOC's rationale for an effects-based approach was that such an interpretation better served the statutory purpose. This position was shared by the NAACP and other civil rights litigation groups. Directly encouraged by the EEOC, which filed helpful amicus briefs, civil rights litigation groups challenged employer testing, and union seniority arrangements had disproportionate and negative effects upon African Americans. These groups sometimes found a receptive audience in Eisenhower and Johnson-appointed federal judges who were struggling with similar issues of racially discriminatory effects of arguably "neutral" state policies in the areas of education, voting, and jury selection.

What turned out to be the critical litigation was *Griggs v. Duke Power Company*,<sup>39</sup> a class action challenging employee tests used by Duke Power for hiring and promoting, on the ground that the employee tests had a discriminatory effect against African Americans, who for years had received third-rate educations in segregated North Carolina schools. The NAACP lost in both the district court and the Fourth Circuit Court of Appeals, but over a powerful dissent by Judge Simon Sobeloff, President Eisenhower's Solicitor General, who had argued *Brown* and who in *Griggs* endorsed a disparate impact approach as the only way to fulfill the goals of Title VII.<sup>40</sup> Upon appeal to the Supreme Court, the NAACP worked from Sobeloff's dissenting opinion, other lower court cases adopting a disparate impact approach, the EEOC's 1966 guidelines on employment tests, and a supportive amicus brief filed by Solicitor General Erwin Griswold for the Nixon Administration. Viewing the Supreme Court's unanimous adoption of a disparate impact approach in *Griggs* from the top down, reasoning from the

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38. EEOC Commissioner Samuel C. Jackson, *EEOC vs. Discrimination, Inc.*, THE CRISIS 16-17 (JAN. 1968).

39. 292 F. Supp. 243 (M.D. N.C. 1968), aff'd, 420 F.2d 1225 (4th Cir. 1970), rev'd, 401 U.S. 424 (1971). The litigation is analyzed from the EEOC's point of view in Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

40. *Griggs*, 420 F.2d at 1239-44 (Sobeloff, J., dissenting).

authorities available to the Court (the statute, its legislative history, and precedent), scholars and pundits were surprised by and critical of the Court's analytically weak opinion in *Griggs*. But viewing the opinion from the bottom up, reasoning from the political alignments in the case, facts revealed about employment practices and their counterproductive effects, and the needs giving rise to the statute, careful observers should not have been so surprised at the Court's opinion, which closely followed the analysis suggested by the nation's most eminent Republican lawyers (Sobeloff and Griswold), the leading civil rights group, and the agency charged with implementing the statute.

### *B. Constitutional Law (Gender Discrimination)*

An assumption of the Constitution's framers was that women are not part of the public citizenry: they were considered submerged in the family unit headed by the husband,<sup>41</sup> and like slaves and poor men, women were not entitled to vote.<sup>42</sup> Notwithstanding their subordination in both the family and the polity, women in the early United States, especially those in the upper classes, asserted their personal and political rights against the traditional claims of their "inferiority."<sup>43</sup> Women gained important political experience as leaders in the abolitionist and temperance movements of the early and mid-nineteenth century. Recall such heroines as Lucretia Mott, Elizabeth Cady Stanton, and Harriet Tubman in the abolitionist movement, and Susan B. Anthony in the temperance movement. Led by Mott and Stanton, an assembly of women and men at Seneca Falls, New York (Stanton's home) issued a "Declaration of Sentiments" on July 19, 1848, which asserted the formal human equality of men and women (tracking the language of the Declaration of Independence but expanding it to include women) and protested the "entire disenfranchisement of one-half the people of this

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41. See I WILLIAM BLACKSTONE, COMMENTARIES ch. XV (1765) (no separate legal existence of wife apart from her husband).

42. See generally M. NORTON, LIBERTY'S DAUGHTERS: THE REVOLUTIONARY EXPERIENCE OF AMERICAN WOMEN, 1750-1800 (1980). No state granted women the right to vote until 1869 (Wyoming) and 1870 (Utah).

43. See, e.g., MARY WOLLSTONECRAFT, VINDICATION OF THE RIGHTS OF WOMEN (1792); SARAH GRIMKE, LETTERS ON THE EQUALITY OF THE SEXES (1838).



country.” Seneca Falls is an important moment in the creation of a new community of interpretation, urging equal rights for women.

Although women were among the leading abolitionists, and many abolitionist leaders such as Stanton and Frederick Douglass advocated suffrage for women as well as the former slaves, the male leaders of the movement quickly abandoned female suffrage after the Civil War and focused their attention on the former slaves.<sup>44</sup> Thus, the Fifteenth Amendment to the Constitution said nothing about women’s right to vote, and the Fourteenth Amendment explicitly wrote “male” into the Constitution. Bitterly disappointed by the betrayal of their supposed male abolitionist and Republican allies, Anthony and Stanton emerged as voices for women to take direct action to assert their citizenship.

The frustrating experience of the Reconstruction Amendments was confirmed by the Supreme Court’s interpretation of them in *Bradwell v. Illinois*.<sup>45</sup> Myra Bradwell’s application for a license to practice law had been denied by the Illinois Supreme Court solely because she was a married woman. The Supreme Court affirmed this judgment with only one dissent. Justice Miller’s opinion for the majority was boring and technical, but Justice Bradley, speaking for three Justices, concurred in the judgment on broader grounds, explicitly articulating a theory of gender:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a

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44. See ELLEN DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA 1848-1869* (1978).

45. 83 U.S. (16 Wall.) 130 (1872).

maxim of that system of jurisprudence that a woman had no legal existence separate from her husband . . . .<sup>46</sup>

Although the Privileges and Immunities Clause interpreted in *Bradwell* was a dead end for gender equality cases in the twentieth century, the Supreme Court could not kill the idea of women's equality. It was an idea that would not die, and constitutional litigation over gender issues continued under the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court continued to rebuff such challenges. For example, in *Goesaert v. Cleary*,<sup>47</sup> the Court upheld a statute allowing a woman to work as a bartender only if she were the wife or daughter of the bar owner. "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."<sup>48</sup> Even the Warren Court did not invalidate a single statute that discriminated against women. For example, in *Hoyt v. Florida*,<sup>49</sup> the Court upheld a statute excluding women from juries unless they affirmatively requested the clerk of the court to place their names on the jury lists. Defendant Geraldine Hoyt argued that the lack of women jurors tainted her conviction for killing her husband with a baseball bat after a "marital upheaval involving, among other things, the suspected infidelity of [Hoyt's] husband."<sup>50</sup>

Ironically, it was the more conservative Burger Court — not the liberal Warren Court — that accepted women's one-hundred-year-old argument that gender cannot ordinarily be the basis for excluding individuals from rights and benefits. In 1971, the Supreme Court for the first time struck down an Idaho statute preferring men over women to administer estates that categorized on the basis of gender.<sup>51</sup> Over the next five years the Court not only guaranteed women a due process

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46. *Id.* at 141 (Bradley, J., concurring in the judgment).

47. 335 U.S. 464 (1948).

48. *Id.* at 466.

49. 368 U.S. 57 (1961).

50. *Id.* at 58-59.

51. *Reed v. Reed*, 404 U.S. 71 (1971).

right to abortions in *Roe v. Wade*,<sup>52</sup> but also interpreted the Equal Protection Clause to require “intermediate scrutiny” of gender classifications in *Craig v. Boren*.<sup>53</sup> These important constitutional developments were neither internal to law, nor even foreshadowed by prior constitutional cases; instead, they repudiated one hundred years of case law.

The developments owed much to women’s political, and not just social or economic mobilization. That mobilization, in turn, owed much to increased job opportunities for women during and after World War II, to technological developments (such as the Pill) enabling women to prevent unwanted or premature pregnancies, and the freedom from men that urbanization and high-speed transportation facilitated. “Women’s Lib” sought adoption of a national Equal Rights Amendment on one front, and aggressively litigated constitutional cases on the other — through the ACLU’s Women’s Rights Project headed by Ruth Bader Ginsburg, the Women’s Law Project and National Women’s Law Center (founded by Wendy Webster Williams and others), and the Women’s Legal Defense Fund. The irony is that at the very point when state and national legislatures were receptive to issues of gender equality, because of the new political activism of women, so too the Supreme Court became receptive, and probably for the very same reasons.

Women’s constitutional victories at the Supreme Court level themselves generated ripple effects throughout the country. In the best example, *Roe* spawned the “right to life” movement, which argues that abortion is the taking of human life.<sup>54</sup> The right to life community is a nomic one, just as women’s rights communities are, and the twenty-year battle over the meaning and vitality of *Roe* has seen the Supreme Court caught like a sparrow in a badminton game between these two intense nomic communities.

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52. 410 U.S. 113 (1973).

53. 429 U.S. 190 (1976). See the survey of the Court’s gender jurisprudence, and a hint that more than intermediate scrutiny might be required, in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

54. See Charles DiSalvo, *Abortion and Consensus: The Futility of Speech, The Power of Disobedience*, 29 WASH. & LEE L. REV. 219 (1991).

C. *Tort Law (Cigarettes and the Anti-Smoking Campaign)*

In my prior examples, I have focused on statutory and constitutional civil rights issues not vastly different from those at stake in *Brown*. I would maintain that such civil rights issues are central to American public law in the *Brown* era, and many others could be added. But economic regulatory issues, like civil rights issues, also evolve from the bottom up.<sup>55</sup> Consider the regulation of cigarette smoking.

Cigarettes are among the great American addictions of the twentieth century, and the post-World War II era saw a rise in smoking, particularly among women.<sup>56</sup> At the same time people were lighting up in ever greater numbers, medical researchers were studying the health consequences of smoking with ever increasing zeal. By the time the Surgeon General, our nation's chief health officer, convened an advisory committee to examine the issue in 1962, there were over seven thousand scientific publications examining the relationship between smoking and health. The advisory committee's report in 1964 found: "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."<sup>57</sup> The scientific and medical community had become a unified community of interpretation. The result has been a thirty-year national interest in smoking and its regulation. Regulation started in the 1960s with rules adopted by the FTC. Congress quickly followed suit in 1965 by requiring warning labels on packages.<sup>58</sup> Following the lead of the FTC and

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55. See, e.g., Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause and the Federalism Mantra*, 71 OR. L. REV. 409 (1992); Emily A. Spieler, *Injured Workers, Workers' Compensation, and Work: New Perspectives on the Workers' Compensation Debate in West Virginia*, 95 W. VA. L. REV. 333 (1993).

56. For the factual background in this paragraph, see generally U.S. DEP'T OF HHS, REPORT OF THE SURGEON GENERAL, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS (1989). Professor Sylvia Law first suggested to me that regulation of cigarettes presents a generalizable model of how Law emerges.

57. SURGEON GENERAL'S ADVISORY COMMITTEE, U.S. DEP'T. OF HEW, SMOKING AND HEALTH 33 (1964).

58. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-40 (1988)).

some state legislatures, Congress amended the law in 1969 to ban cigarette advertising on television.<sup>59</sup>

The regulation of cigarettes took a new turn in the 1980s, as it became clearer to scientists and citizens that cigarette smoking is not only hazardous to the smoker's health, but also to the health of those in the same room or building.<sup>60</sup> The dangers of "passive smoking" generated an aggressive new community of interpretation, one seeking the ban of cigarettes entirely from public spaces. The guerilla warfare against smoking has been fought in private workplaces, city councils, state legislatures, the FAA, the Surgeon General's Office, and recently in the state courts and the Food and Drug Administration (FDA). The goals of the movement are threefold: (1) to discourage smoking, especially among the young, before they become addicted; (2) to prohibit smoking in public places; and (3) to regulate cigarette companies more extensively.

Illustrative of the third goal is the lawsuit filed by Rose Cippolone and her husband, both of whom subsequently died of cancer, against cigarette companies. The lawsuit was based on state tort and contract law, including claims for fraud and misrepresentation, breach of warranty, failure to warn, and conspiracy to withhold scientific information about the dangers of smoking. Several state courts and federal courts of appeals have allowed such lawsuits to proceed, thereby threatening the financial future of cigarette companies and their wares. The companies took the Cippolones' lawsuit to the Supreme Court, but they were opposed by a coalition of law professors and anti-smoking activists who supported the Cippolones' claims.

The Supreme Court split every which way in *Cippolone v. Liggett Group, Inc.*,<sup>61</sup> but a majority held that the claims of breach of express warranty, fraud and misrepresentation, and conspiracy are not preempted by federal law (which does not provide a damages action at this

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59. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. § 1331-39 (1988)) (amending the 1965 Act).

60. See OFFICE OF HEALTH & ENVTL. ASSESSMENT, U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992).

61. 112 S. Ct. 2608 (1992).

point).<sup>62</sup> The Supreme Court's decision hardly settles the war between the tobacco companies and the anti-smoking forces, which will now do battle in state and federal courts over the common-law claims that are not preempted. There is some indication in light of recent revelations that federal regulators at the FDA might also enter the fray. What is particularly remarkable is that the *Cippolone* litigation would have been inconceivable a decade ago, before the passive smoking evidence had become widely accepted.

Viewing the law from the bottom up is only the beginning of wisdom, for there is a deeper story of public law. Just as my generation was inspired by *Brown*, so we have been haunted by that decision. I should say *decisions*, for there are three important Supreme Court decisions in the *Brown* litigation:

- The 1954 decision (*Brown I*) declaring segregation unconstitutional, which we tend to admire for its moral vision, and notwithstanding the decision's slender support in traditional rule of law criteria.
- The 1955 decision (*Brown II*) entering a remedial order directing the lower courts to create unitary, nonsegregated school systems, but "at all deliberate speed," which was read as an invitation to delay.<sup>63</sup> It was not until the late 1960s (when I was in high school) that significant desegregation was achieved in the South.
- In 1939 Linda Brown, now a mother, persuaded the Tenth Circuit Court of Appeals that the Topeka School System was still segregated; the court ordered further relief for Brown in the original lawsuit, which had never been dismissed. The Supreme Court in 1992 remanded the case (*Brown III*) for further consideration<sup>64</sup> in light of its opinion in *Pitts v. Free-*

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62. *Id.* at 2621-25 (Stevens, J., plurality opinion); *Id.* at 2625 (Blackmun, J., concurring).

63. *Brown v. Board of Educ.*, 347 U.S. 483 (1955) [hereinafter *Brown II*].

64. *Brown v. Board of Educ.*, 112 S. Ct. 1657 (1992) [hereinafter *Brown III*], *vacating and remanding*, 892 F.2d 851 (10th Cir. 1989), *rev'g* 671 F. Supp. 1290 (D. Kan. 1987).

*man*,<sup>65</sup> where the Court suggested that it was time for district courts to abandon efforts to implement *Brown*.

Is the withering of *Brown* a betrayal of our vision of law from the bottom up?

### III. LAW AND POLITICAL CONSENSUS

Viewing law from the bottom up does not inexorably press law in progressive directions, for social and political developments can press in any direction. Moreover, a bottom up view of law does not deny the importance of institutions — indeed, I insist upon their role. While technology and the redistribution of social and economic power and status may be the engines of constitutional and statutory change, their instruments are the institutions of government.

There, the struggle for legal meaning is played out in a complex way. Consistent with my understanding of law as effervescing upward rather than being handed downward, I view state institutions as interdependent with one another and with popular opinion.<sup>66</sup> Accordingly, law is a creation by several organs working together. The way institutions work together in our polity is hierarchical, for one institution can veto or displace the policy choice made by an institution subordi-

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65. 112 S. Ct. 1430 (1992).

66. For introductions to theories of the interactive institutional political process, see Symposium, *Positive Political Theory and Public Law*, 80 GEO L.J. 457 (1992); PETER C. ORDESHOOK, *A POLITICAL THEORY PRIMER* (1992); WILLIAM H. RIKER & PETER C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (1973); OLIVER WILLIAMSON, *THE ECONOMICS OF GOVERNANCE*, in *ECONOMICS AS A PROCESS* (Richard N. Langlois ed., 1986). See also JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); KNIGHT, *supra* note 2; RUSSELL HARDIN, *COLLECTIVE ACTION* (1982); JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* (1989); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); ANDREW SCHOTTER, *THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS* (1981). Earlier political science works exploring the role of the Supreme Court within an interdependent political system include WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); HERMAN C. PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT* (1961); Glendon A. Schubert, *The Study of Judicial Decision-Making as an Aspect of Political Behavior*, 52 AM. POL. SCI. REV. 1007 (1958).

nate to it. This structure of institutional interdependence creates a phenomenon of "anticipated response." That is, a legal actor's policy choice will be guided not only by the actor's own preference, but also (in varying degrees depending upon the context) by what the actor anticipates will be the interpretation of someone or an institution higher up in the hierarchy of lawmaking authority.

This theme should be intuitive to lawyers. If I am giving you tax advice, I shall consider your goal of minimizing your tax liability, but I shall also consider the probable response of the IRS to different interpretations I give to the tax laws. If I am sure a certain deduction will trigger an IRS audit, I might advise you against taking it, even if I consider taking the deduction a highly plausible or even probable reading of the Internal Revenue Code. In evaluating your claims for a deduction, the IRS, in turn will consider not just its interests and its views about the statute, but will also consider what interpretation the Tax Court will give the statute. The Tax Court will consider the Court of Appeals and the Supreme Court's views before it interprets the statute. And, perhaps surprisingly, the Supreme Court will interpret the statute with an eye on what the current Congress wants. Just as the Tax Court can be overruled by the Supreme Court and will therefore consider the Supreme Court's views, so the Supreme Court in a statutory case can be overridden by Congress and so will consider its views, if they are known.<sup>67</sup>

To develop the hypothesis about the importance of anticipated response for the evolution of statutory policy, consider judicial review as a sequential political game. As argued above, the Supreme Court does not choose the issues that bubble up through the political system; those issues are presented to the Court by warring nomic communities. Based upon the Justices' interpretations of the relevant legal materials, their political preferences, and the facts and equities of the case, the

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67. For theoretical and empirical support, see William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 391-97 (1991) [hereinafter Eskridge, *Overriding Statutory Decisions*]. For an excellent argument that a court seeking to protect original legislative expectations would also attend to current legislative preferences, see John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO L.J. 565 (1992).



Court will have preferences about what it wants to do in the case. But the Court's disposition of the case may not perfectly reflect these preferences, what it thinks would be "right" in light of authoritative text, precedent, or even social policy. The Court is very interested in how its decisions will be received by the body politic, not only because the Court's legitimacy is as precious as it is fragile, but also because political organs are well situated to hurt the Court.

This is the warp and woof of constitutional law. Recall *Marbury v. Madison*,<sup>68</sup> Chief Justice John Marshall's ingenious opinion that established the power of judicial review itself. The first part of Marshall's opinion reviewed the refusal of Secretary of State Madison to hand over a commission to Judge-designate Marbury. Marshall found Madison's refusal illegal, but realized that any order from the Court directing Madison to deliver the commission would have been disobeyed, thereby undermining the Court's institutional position. Hence the second part of the opinion announced that the Court had no jurisdiction to entertain Marbury's case, because section thirteen of the Judiciary Act granting the Court jurisdiction was unconstitutional. To accomplish this trick, Marshall had to rewrite section thirteen to have it vest the Court with original jurisdiction in mandamus cases, strain Article III to make it inconsistent with the rewritten Judiciary Act, and then triumphantly declare the authority of the Court to review statutes for consistency with the Constitution. Marshall's opinion in *Marbury* is considered a brilliant moment because the Chief Justice was able to head off political disaster, an order bound to be disobeyed, while at the same time embarrassing his enemies and establishing an important judicial power for future cases.

Contrast *Dred Scott v. Sandford*,<sup>69</sup> the most notorious decision in the Court's history and only the second time (the first being *Marbury*) the Court invalidated a federal statute. The decision is notorious partly because it rejected the voice of Dred Scott, who represented a community of interpretation (slaves who rejected their status, as well as their abolitionist allies) that was to sweep the future. But the decision is also

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68. 5 U.S. (1 Cranch) 137 (1803). This discussion draws from William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

69. 60 U.S. (19 How.) 393 (1856).

a blunder of historic proportions, because it reflected the raw preferences of a Court dominated by Southerners and did not reflect the same sort of astute anticipation of political response that characterized *Marbury*. Chief Justice Roger Taney was every bit as good a lawyer as John Marshall, but his political judgment failed him in the most important case of his tenure: by invalidating the Missouri Compromise of 1820, which had prohibited slavery in the Northwest Territory in return for leaving it optional in the rest of the country, the Taney opinion in *Dred Scott* failed to anticipate the political response, especially the popular response. The abolitionists considered the decision a declaration of war, and it undermined the ability of the political system to achieve a compromised equilibrium on the slavery issue — dooming the institution Chief Justice Taney was trying to preserve. In a real sense, by removing the possibility of compromise, *Dred Scott* did help precipitate the Civil War.

Return to the Supreme Court's decisions in *Brown*, and consider them as moves in an anticipated response game of this sort. Accounts of the Court's internal discussions reveal that all or almost all of the Justices believed *de jure* segregation to be unconstitutionally wrong, but several Justices were hesitant about the political consequences of requiring integration in the South.<sup>70</sup> The Court solved its problem by breaking up the opinion: *Brown I*, declaring *de jure* segregation in public schools unconstitutional, would be announced immediately, while *Brown II*, the remedial order, would be announced later, after further briefing and (importantly) after the Court was able to gauge the political support for *Brown I*. The Court's judgment in 1955 was that immediate desegregation was not possible, and its "all deliberate speed" formulation sought to give lower courts discretion to tailor relief politically.

Even *Brown II*, however, yielded disappointing feedback to the Court: the South turned toward defiance; the Eisenhower Administration remained studiously mum; and Congress did nothing to back up the Court. The *Brown II* experiment was disappointing in the short

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70. See KLUGER, *supra* note 18; Hutchinson, *supra* note 5; Tushnet & Lezin, *supra* note 5.

term, and the Court declined to press matters further for the next ten years — with one exception. In *Cooper v. Aaron*,<sup>71</sup> the Court directed Governor Orval Faubus of Arkansas to obey a desegregation order, but the Court was able or willing to do so only because President Eisenhower was willing, even if not eager, to back up the federal order with armed force.

The Court's posture changed markedly in and after 1963 because the political climate changed: President Johnson won enactment of the Civil Rights Act of 1964,<sup>72</sup> whose Title II conditioned federal educational aid to desegregation; Johnson won a landslide victory over a candidate who had opposed the Act; and the Court went on an immediate and sweeping civil rights binge. Between 1963 and 1971, the Court announced that *Brown II*'s regime of "all deliberate speed" was at an end, and swifter progress toward a unitary school system was required.<sup>73</sup> In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>74</sup> the Court unanimously approved a sweeping district court order requiring, among other things, busing to achieve racial desegregation.

*Swann* was in some respects the high-water point of the Court's willingness to enforce *Brown*, but the decision yielded political reactions that were largely negative. Jurisdiction-stripping bills were seriously considered in Congress, state and local politicians (including liberal Democrats) ran against busing, and Richard Nixon won a landslide victory in 1972 on a platform critical of busing. Nixon had already remade the Court, with four appointments, but it was not until after 1972 that the Burger Court initiated a process whereby lower courts were limited as to what they could do to remedy *Brown* violations. Indeed, the Burger Court's retreat coincided with an important development at the bottom: white flight from integrated school systems. The ground level, where the battles for law are fought, was often in-

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71. 358 U.S. 1 (1958).

72. 42 U.S.C. §§ 2000(a) et seq. (1988).

73. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968). See also *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *Watson v. Memphis*, 373 U.S. 526 (1963).

74. 402 U.S. 1 (1971).

hospitable to federal judicial requirements that school systems be integrated.

The Rehnquist Court, in a series of cases including *Brown III*, has announced that lower courts should start divesting themselves of jurisdiction over desegregation cases.<sup>75</sup> The Court noted in 1992: "Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts."<sup>76</sup> Concurring in this opinion, Justice Scalia added:

At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools. We are close to that time.<sup>77</sup>

These decisions are usually explained as the effort by Reagan-appointed conservatives to retreat from the mandate of *Brown*. Indeed, the Reagan-Bush Justices are almost uniformly more conservative about judicial remedies for *Brown* than are Justices appointed by other Presidents. This itself is part of the feedback process: Presidents Reagan and Bush were elected on a platform of getting the federal government off people's backs, and the Justices they appointed have on the whole reflected this sentiment. But the bottom up view of law would insist that more is going on than simply a more conservative bunch of Justices imposing their raw preferences on the lower courts. I believe that the Court is also responding pragmatically to residential patterns and politically to the vanishing support for continuing the costly process of implementing *Brown's* vision of completely integrated public schools. Indeed, in *Pitts*, African-American parents sought intervention in order to argue that they preferred neighborhood schools and disliked busing;

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75. See *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Brown III*, 112 S. Ct. 1657 (1992) (remanded for further consideration in light of *Pitts*).

76. 112 S. Ct. at 1448.

77. *Id.* at 1453 (Scalia, J., concurring).

they wanted neighborhood schools even at the expense of *de facto* segregation, so long as the schools were adequately funded.<sup>78</sup>

The anticipated response game that the Supreme Court has been engaged in these last forty years of desegregation litigation deepens our understanding of bottom up public lawmaking. On the one hand, we can see that the creation of public law is a dynamic process: not only are new challenges being constantly presented by new or persistent communities of interpretation, but the old challenges are handled differently over time by the same Justices, either because of feedback they have received from the world or because of new political pressures to which they are responsive. The Supreme Court does follow the election returns, not only because new elections yield Presidents who appoint Justices with whom they agree, but also because new elections yield new political balances to which the Justices are attentive.<sup>79</sup>

On the other hand, issues of public law do not remain in flux forever, and the anticipated response feature of public lawmaking suggests that at some point — perhaps sooner, perhaps later — the political and social process will become stable because all the political actors will realize that any effort they might make to change the legal status quo will result in their being overridden or penalized.

The foregoing analysis suggests a consensus vision of law. When there is general societal agreement about what the rules are, or when dissenters are unable to gain institutional allies for their views, the consensus has the force of law or soon enough influences what had previously been taken as law. Similar to Dean Teree Foster's explanation of *ius cogens*, customary practice in international law,<sup>80</sup> the

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78. 112 S. Ct. at 1430.

79. For empirical evidence to this effect, see THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions?*, 87 AM. POL. SCI. REV. 87 (1993). See also David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decisionmaking in the Post New Deal Period*, 47 J. Pol. 652 (1985); GREGORY A. CALDEIRA, COURTS AND PUBLIC OPINION, in THE AMERICAN COURTS (John B. Gates & Charles A. Johnson eds., 1991).

80. See Viktor Mayer-Schönberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations through Binding International Law* (1994) (unpublished manuscript, on file with the *West Virginia Law Review*).

positive commands of domestic law are understood in light of institutional consensus, actual practice, and popular acceptance. Consider this popular and institutional consensus view of law in connection with the types of issues examined in Part II.

### A. *Statutory Interpretation (Griggs)*

Recall immediate efforts within the EEOC to interpret Title VII to prohibit at least some employer policies that have a "demonstrable racial effect." The statutory bargain struck to enact Title VII represented a compromise between the House's preferences and the more conservative Senate's preferences on issues concerning how intrusive the government should be in employer hiring and promotion decisions.<sup>81</sup> Once Title VII was enacted into law, however, the agency populated by Johnson Administration liberals could move statutory policy to the left of the Senate's preferences because there were not enough votes in either the House or Senate to override an agency protected by presidential veto. Dynamic statutory interpretation can occur immediately after a law's enactment, as it did in the Johnson and Nixon EEOC, because the ideology of the implementing agency might be very different from that of the enacting coalition.<sup>82</sup>

The EEOC moved very cautiously, nonetheless, both because it was internally uncertain as to the best way to enforce the statute and because it was concerned that the Court, if not Congress, would override a dramatic policy shift. The EEOC took a risk by supporting the NAACP in the *Griggs* litigation, but the risk paid off when the Supreme Court confirmed a new Title VII policy that represented a dra-

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81. Indeed, the compromise was skewed to the right of even the preference of the median Senator, because the need to obtain a two-thirds majority in the Senate rendered conservative Senator Dirksen the pivotal voter. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* (1986) (detailed account of the political maneuvering within Congress).

82. Positive political theory suggests that Congress would limit the agency's ability to shift policy immediately, through procedural as well as substantive provisions in the statute. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). Dirksen tried to do this with the EEOC by insisting on procedural rules limiting the EEOC's policymaking power.

matic shift to the left of the policy adopted by Congress in 1964. Three different political dynamics enabled Title VII's policy to shift radically to the left between 1964 and 1971. One dynamic was simply the internal politics of the EEOC and the Supreme Court, both of which were pressed from below by an academic and elite cultural consensus in favor of vigorous enforcement of Title VII.

A second dynamic was some shift to the left in congressional preferences between 1964 and 1971 due at least in part to the increased electoral power of African Americans following enactment of the Voting Rights Act of 1965.<sup>83</sup> When the preferences of Congress shift in the direction of the interpreter's (EEOC or Supreme Court) preferences, then the interpreter has more freedom to apply the statute dynamically, since the only Congress to which it is directly accountable is the current Congress. But any shift in legislative preferences between 1964 and 1971 was modest<sup>84</sup> and does not completely explain how the EEOC and the Court could shift Title VII's policy so far to the left.

*Griggs* might have been an interpretation of Title VII that represented a policy more vigorous than that which Congress would have wanted in 1971. Yet Congress did not override *Griggs*, even though it amended Title VII immediately after the case was decided, and even though the employer community wanted *Griggs* curtailed or overridden. The key to this nonevent was the enthusiastic endorsement of *Griggs* in committee reports drafted in 1971 by the House and Senate labor committees.<sup>85</sup> Those reports may not have been representative of the views of the median member of Congress, however, because the House and Senate labor committees have in the last generation been dominated by members with preferences to the left of their colleagues on issues of civil rights.<sup>86</sup> Because those committees exercise "gatekeeping"

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83. 42 U.S.C. § 1971 (1988).

84. BARBARA SINCLAIR, *AGENDA, POLICY, AND ALIGNMENT CHANGE FROM COOLIDGE TO REAGAN*, in *CONGRESS RECONSIDERED* 291, 306-07 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

85. See H.R. REP. No. 238, 92d Cong., 1st Sess., 21-22 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2156-57; S. REP. No. 415, 92d Cong., 1st Sess., 14 (1971).

86. There is some question in the literature as to whether congressional committees are likely to have "outlier" preferences and, if so, whether the chamber will defer to them. See

power over issues on the legislative agenda, they have substantial ability to head off overrides, especially if they are supported by the majority party leadership, which in 1971 was similarly liberal on civil rights issues.

The Nixon and Carter Administrations supported *Griggs* and its stepchild, *United Steelworkers v. Weber*,<sup>87</sup> where the Court in 1979 adopted the EEOC's view that Title VII permits employers and unions to adopt voluntary affirmative action programs, especially as measures to improve workforce percentages that might be vulnerable under *Griggs*. Ronald Reagan and his successor ran for President on platforms hostile to *Griggs* and *Weber*, and for three election cycles that platform won substantial presidential victories. Although Congress was in the 1980s more committed to *Griggs* than it had been in the 1970s, the Reagan EEOC led a movement to overrule or narrow both *Griggs* and *Weber*. Since the EEOC does not have substantive rulemaking power, it was required to appeal to the Supreme Court, as the Nixon EEOC had done in 1971. Here the President's lawmaking authority manifested itself in another way: by 1989, there were four Reagan-nominated Justices in place. In *Wards Cove Packing Co. v. Atonio*,<sup>88</sup> a closely divided Court, with all four Reagan Justices in the majority, narrowed *Griggs* by creating new and higher burdens of proof for plaintiffs alleging disparate impact discrimination.

An outraged Congress in 1990 tried to override *Wards Cove*, an effort that failed by one vote in the Senate,<sup>89</sup> suggesting that the Court might have hit the congressional veto median on the button. The median slid a bit in 1991, when a more moderate override bill passed Congress and was signed by the President.<sup>90</sup> The *Wards Cove* episode shows how the interdependence of the legislative, executive, and judi-

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KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION, ch. 4 (1991). Through most of the last generation, the labor committees in both House and Senate have been significantly more liberal than the chamber medians. See *id.* at 129 (Table 4.6) (House); Eskridge, *Overriding Statutory Decisions*, *supra* note 67, at 369 n.114 (Senate).

87. 443 U.S. 193 (1979).

88. 490 U.S. 642 (1989).

89. 136 Cong. Rec. S16,589 (daily ed. Oct. 24, 1990).

90. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981 (Supp. 1992)).



cial branches affects lawmaking, for each institutional actor behaved strategically in light of the preferences of the others: the EEOC calibrated its highly rightward preferences to craft a position the Court could accept, and the Court sought a moderate position (it refused to overrule *Griggs*, for example) in order to avert an immediate congressional override. Congress, in turn, had to moderate its own preferences for a strongly leftward override, in order to accommodate the President's preferences, or the preferences of enough Republicans to make a veto override possible.

More important, the preferences of the different institutions were not static, and their evolution was responsive to changing popular attitudes. That *Griggs* was put into play at all was an institutional response to campaign themes successfully advanced by the Republican candidates throughout the 1980s. Because of that popular pressure, as well as the presidential veto, Congress was unable to return policy to *Griggs*. But Congress was able to move policy away from *Wards Cove*, though only after a further process of popular feedback that persuaded Republican Senators in 1991 that a civil rights bill was needed.<sup>91</sup> President Bush's willingness to sign the bill in 1991, even though he denounced the not-so-much-different 1990 bill as blatant "quotas" legislation, was probably something more than mere political calculation (until 1992, every Bush veto was sustained).

### *B. Administrative Law (Chevron)*

A further issue posed by *Griggs* involves the interaction of agencies and courts in the creation of public law. Under the traditional top-down view of law, the role of agencies is to implement the directives Congress put in their authorizing statutes, and the role of the Court is, as in *Marbury*, to say what the law is and to override agencies that strayed from it. The modern regulatory state has moved toward a more bottom up view of law, where Congress creates agencies, gives them general goals, and then turns them loose on an unpredictable world in

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91. In October 1991, a group of Republican Senators who had supported the 1990 veto allegedly told President Bush that they were not inclined to support a second veto. The defection of just one Senator would have ensured a Senate override of the veto.

which different communities of interpretation will vie for the agency's favor. A question then arises: What should be the relationship between the Supreme Court and agencies?

The leading analysis is the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>92</sup> The Clean Air Act, as rewritten in 1977, required states that had not met federal ambient air quality requirements to establish a permit program to regulate "new or modified major stationary sources" of air pollutions.<sup>93</sup> Between 1977 and 1981, the Environmental Protection Agency (EPA) experimented with various rules to implement the legislative directive. Industry groups argued for a "bubble concept" defining "stationary source" as a whole plant, thereby allowing firms to avoid applying for permits when they increased emissions in one part of the plant, so long as the plant's overall emissions level did not increase. The EPA rejected the bubble concept, however, and required plants in targeted states to obtain permits for emissions increases anywhere within a plant.<sup>94</sup> In 1981, the EPA changed its position and adopted the bubble concept. The District of Columbia Circuit Court of Appeals, in an opinion by Judge Ruth Bader Ginsburg, overturned the agency's dynamic interpretation as inconsistent with the statutory language and purpose.<sup>95</sup> The Supreme Court in *Chevron* reversed, holding that where Congress had not explicitly addressed the interpretive issue, courts should defer to the agency's decision so long as it is "reasonable."

Justice John Paul Stevens' opinion in *Chevron* held that courts should defer to agency interpretations of statutes they are charged with implementing:

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges — who have no

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92. 467 U.S. 837 (1984).

93. 42 U.S.C. § 7502(b)(6) (1988).

94. See *Chevron*, 467 U.S. at 855-59.

95. *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982) (following *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978)), *rev'd sub nom. Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

constituency — have a duty to respect the legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: “Our Constitution vests such responsibilities in the political branches.”<sup>96</sup>

The opinion also rejected the argument that the agency’s change of position dilutes the deference owed to it. “An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informal rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”<sup>97</sup>

I would read *Chevron* as an exemplar of strategic institutional interaction. The decision is the Court’s signal that the bottom up struggle for statutory meaning should be fought and focused at one level. *Chevron* reveals the Court’s accurate recognition that agencies are not only better situated to evaluate new factual circumstances and new efforts by private communities to create law, but are also better situated to discern political consensus and discord. Unlike the Court, an agency is not only politically accountable, but also politically well-informed — about the preferences not only of the President who appoints and sometimes controls the agency, but also of the Congress, whose members communicate with, pressure, and appropriate money for the agency.<sup>98</sup> Recognizing this, *Chevron* insists upon deference to agency views, even when they are in the process of changing. There is a loophole to *Chevron* that preserves a substantive role for the Court. Consider the following example of *Chevron* in action.

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96. *Chevron*, 467 U.S. at 866.

97. *Id.* at 863-64. *Accord*, *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975). *But see, e.g.*, *Zenith Radio Corp. v. United States*, 436 U.S. 443 (1978) (longstanding agency interpretation receives greater deference).

98. Agency heads are responsive to the President, who not only appoints them, but also supervises their rulemaking through the OMB, and can discipline them directly (for executive department agencies) or indirectly (for independent agencies). Congress communicates with agencies informally all the time, and formally through confirmations, oversight, and appropriations.

In 1970, Congress enacted Title X of the Public Health Service Act, which provides federal funding for family-planning services.<sup>99</sup> The purpose of the Act is to assist in making "comprehensive voluntary family planning services" available to people. The Act authorizes the provision of federal funds to support the establishment and operation of voluntary family planning projects and empowers the Secretary of Health and Human Services (HHS) to promulgate regulations imposing conditions on grant recipients. Section 1008 stipulates: "None of the funds appropriated under this Act shall be used in programs where abortion is a method of family planning."<sup>100</sup> The 1971 regulations provided that, "the project will not provide abortions as a method of family planning," but did not regulate the form of counseling or the distribution of information at federally funded projects.<sup>101</sup> In 1988, HHS promulgated new regulations preventing personnel in Title X projects from providing any counseling or information about abortion to care recipients.<sup>102</sup> In *Rust v. Sullivan*<sup>103</sup> the Supreme Court affirmed the agency's new regulations under *Chevron*, finding that the statute and its legislative history did not clearly answer the question, the agency's interpretation was a reasonable reading of the statute, and the agency's change in policy was one that the dynamic administrative interpreter was entitled to make. Four Justices dissented, on the ground that the agency's interpretation pressed the statute well beyond its original purpose and arguably infringed upon both free speech and abortion rights.<sup>104</sup>

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99. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1506.

100. According to the conference report for the Act, the § 1008 restriction was to ensure that Title X funds would "be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities." Conf. Rep. No. 91-1667, 91st Cong., 2d Sess., 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5080, 5081-82.

101. See 42 C.F.R. § 59.8(a)(1) (1971).

102. Section 59.8(a)(1) of the 1988 regulations specified that henceforth a "[t]itle X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." See also § 59.8(a)(2)-(3), -(b)(5). 42 C.F.R. § 59.8 (text of section suspended effective Feb. 5, 1993).

103. 111 S. Ct. 1759 (1991).

104. Justice Stevens, the author of *Chevron*, dissented in *Rust* because the agency's position went well beyond, and arguably against, Congress' announced purpose of providing counseling and materials to help people plan their families. The statute's exclusion of plans

*Rust* was a case where there was no popular or political consensus, and the Court knew the score as well as the agency did: the President supported the restrictive regulation and would use his veto power to protect the Court if it sustained HHS, while Congress was opposed to the gag order and would use its legislative power to protect the Court if it were to overturn HHS. This is a case where the Court could vote its raw preferences, and the Justices lined up pretty much the way they lined up cases challenging abortion restrictions on constitutional grounds.<sup>105</sup>

### C. Constitutional Law (Abortion)

Cases like *Rust* signaled the political system that the Reagan-Bush Court was open to reconsidering the validity of *Roe*. On the eve of the 1992 presidential election, and to the surprise of many pundits, the Court reaffirmed *Roe* in *Planned Parenthood v. Casey*.<sup>106</sup> *Casey* is the apotheosis of a pragmatic, consensus view of law.

There were no more than two Justices on the Court in 1992 who thought *Roe* was correctly decided as an original matter. Yet five Justices reaffirmed the right recognized in *Roe*. The plurality opinion was

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where abortion is a “method” of family planning apparently referred only to programs that actually perform abortions, and not to programs that provide professional information about the possibility, he argued. Justice O'Connor dissented because the issues of censorship and women's opportunities to obtain useful information raised constitutional questions that Congress needed to address. Justice Blackmun dissented because the agency regulations were an unconstitutional infringement upon doctors' First Amendment rights to provide information and counseling and women's rights to abortions. Justice Marshall joined the Stevens and Blackmun dissents.

105. That is, Justices Marshall, Blackmun, and Stevens dissented on the constitutional issue in *Rust*, and all three have consistently supported a broad reading of *Roe*. Justices O'Connor and Souter were on the fence: the former dissented on the narrow ground that the Court should interpret the statute narrowly to avoid thorny constitutional issues, and the latter remained undecided until the eleventh hour (according to records of the Court's internal deliberations, which are available in the Papers of Thurgood Marshall, housed at the Madison Building of the Library of Congress). Chief Justice Rehnquist and Justices White, Scalia, and Kennedy — the four Justices who sought to narrow or overrule *Roe* in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) — strongly favored the HHS “gag order.”

106. 112 S. Ct. 2791 (1992).

written jointly by Justices O'Connor, Kennedy, and Souter, the first two of whom had written or joined opinions hostile to *Roe* and critical of its reasoning. A number of hypotheses can be advanced for the willingness of an anti-abortion Court to reaffirm *Roe*. One is that the Court did fear an override of any decision overruling *Roe*. Though it seems unlikely that a conflictual issue such as this one would have sustained a constitutional amendment, Congress was prepared to adopt a Freedom of Choice Act assuring a woman's right to control her own body during pregnancy.<sup>107</sup> Such a statute would have been vetoed by President Bush, and it would not have been clear that two-thirds majorities could not have been mustered for an override of such a veto. But a Supreme Court overruling of *Roe* would also likely have increased the chances of Bush's defeat in the 1992 election, for it would have galvanized millions of women in favor of any plausible Democratic nominee. With Bush's defeat would have come a political override of any Court decision refusing to recognize a right to abortion.<sup>108</sup> *Casey* itself was a highly conservative interpretation of *Roe*; holding that the states can regulate the right to abortion in many different ways. *Casey* cuts the heart out of *Roe* even while reaffirming it — perhaps the perfect result from the perspective of the joint opinion, and certainly a much more attractive result from their point of view than anything Congress would enact.

This is a plausible hypothesis, but I think a stronger one is one suggested by the joint opinion itself. The joint opinion contains a remarkable constitutional history, explaining not only why events subsequent to *Roe* did not compel its overruling, but also why the Court was right to overrule *Lochner v. New York*<sup>109</sup> and *Plessy*, but not *Roe*.<sup>110</sup> The joint opinion tells a story of shifting popular as well as institutional consensus: the laissez-faire philosophy embedded in *Lochner* was obsolete after the Great Depression and the New Deal,

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107. See the proposed Freedom of Choice Act, S. 25, 102d Cong., 2d Sess. (1992); H.R. 25, 102d Cong., 2d Sess. (1992), nicely analyzed in Ira C. Lupu, *Statutes Revolving in Constitutional Orbits*, 79 VA. L. REV. 1 (1993).

108. Of course, Bush was defeated anyway, but his defeat was hardly predictable in June 1992, when *Casey* was decided.

109. 198 U.S. 45 (1905).

110. *Casey*, 112 S. Ct. at 2812-16 (joint opinion).

and the white supremacist philosophy embedded in *Plessy* was an embarrassment after World War II; the Court was wise to overrule each decision, because they were inconsistent with established political agreement. *Roe*, on the other hand, remains a viable political institution, if anything more viable in light of women's increasing involvement in politics and in light of the nation's repudiation of Justice-designate Robert Bork because of his anti-privacy jurisprudence, to mention just two salient developments.

#### IV. CONCLUDING NORMATIVE QUALMS

The joint opinion in *Casey* is the Court's bowing to the winds of history and politics — acknowledging the familiar lesson that once Pandora opens the box, there is no closing it. Like *Brown III*, *Casey* reflects my view of law as popular and institutional consensus. However, like *Brown III*, *Casey* reflects the normative qualms we should have about the description of law that has been outlined in this article. Recognizing that law is created by nomic communities from the bottom up does not tell us which community's views should prevail. Recognizing that law reflects existing political consensus does not tell us whether the particular consensus is a good or just one. The descriptive vision of law I have outlined does suggest that our polity acts perilously when it stubbornly suppresses one group, so much that the group is effectively excluded from citizenship; but the descriptive vision tells us little more than that.

*Casey*, for example, reaffirmed *Roe* but nonetheless upheld most of Pennsylvania's restrictions on the woman's right to an abortion, including a requirement that a mature woman must wait twenty-four hours between asking for an abortion and receiving one, and a requirement that a married woman certify that she has told her husband of her decision to have an abortion. The Court upheld these precise requirements for pragmatic reasons: even though they may burden the woman's decision, they also help ensure that it is an informed and deliberative decision. One might question whether such burdens would have been upheld if men were capable of pregnancy as women are. Recall Judith Jarvis Thompson's famous kidney machine hypothetical: a man wakes up, finding medical apparatus attached to his kidney, to

support the life of a man next to him, a celebrated violinist in fact. The support is only needed for nine months, after which the violinist will be able to live a normal life.<sup>111</sup> Would a court or a legislature require the first man to give up nine months of his life to support the second? It seems doubtful, even if the first man were partly responsible for the second man's predicament.

Similar equality concerns can be raised about *Brown III*. Is the following situation intolerable: the state works for a hundred years to create a system of apartheid, in which anyone with a drop of black blood is rigorously separated from the rest of society and in a way that hourly reminds such people that they are considered inferior and servant. Apartheid reinforces the views of the dominant race that the segregated race is inferior. The society becomes aware that its policy is an embarrassment in the world community and ends it. But residential patterns do not change, and the school districts created around residential patterns continue to divide children by race. The Court then says that thirty years of effort is enough. How you will vote in cases like this is revealed by whether you can keep a straight face.

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111. See Judith Jarvis Thompson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971).